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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1047

MILLER AND COMPANY OF BIRMINGHAM, INC.,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

JAMES E. CLARK,
1103 City Federal Building,
Birmingham, Alabama,
Counsel for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Reason for granting the writ	4
Conclusion	14
Appendix A	15
Appendix B	26

Cases Cited.

Bisso v. Inland Waterways Corp., 75 S. Ct. 629, 349 U. S. 85, 99 Law Ed. 991	5, 6
Chicago & Northwestern RR Co. v. Davenport, 205 Fed. 2d 589	7
Dixilyn Drilling Corp. v. The Crescent Towing & Salvage Company, 83 S. Ct. 967	6
Gulf, M. & O. R. Co. v. Scott, 27 Sou. 2d 150	7
Hissong v. Richmond & D. R. Co., 91 Ala. 517, 8 So. 776	9
The Steamer Syracuse, 12 Wall. 167, 20 L. Ed. 382	5
The Wash Gray, 277 U. S. 66, 48 S. Ct. 459, 72 L. Ed. 787	5

Statutes Cited.

175 A. L. R., p. 102	12
Art. 12, Sec. 242, Alabama Constitution, 1901	2
Title 48, Code of Alabama 1940, Secs. 170, 173, 205	2, 3, 10, 11
28 U. S. C., Sec. 2514 (1)	2

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 31, 1964.

OPINIONS BELOW.

The judgment of the District Court (R. 29-31), entering judgment on the findings of fact and conclusions of law and the subsequent overruling of the defendant's Motion For a New Trial and, in the alternative, to amend

the judgment, are unreported. The opinion of the Court of Appeals (R. 37), reported at 328 Fed. 2d 73, is set out in the appendix to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 31, 1964 (R. 50). Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 2514(1).

QUESTIONS PRESENTED.

(I)

Can a common carrier contract with another in Alabama to secure indemnity from its own negligence or does this violate public policy?

(II)

Can a carrier, operating under a public franchise in Alabama, contract with another to secure indemnity for its own negligence and not contravene the public policy of said State?

(III)

Can the Court of Appeals construe the public policy of a sovereign State in direct disregard of the settled law and statutes of such State?

STATUTES INVOLVED.

The determination of the status of respondent at the time the contract herein was executed, i. e., whether it was acting as a common carrier or in a private capacity, involves the construction of Article 12, Sec. 242 of the Alabama Constitution of 1901 and Title 48, Code of Alabama 1940, Sections 170, 173 and 205 as recompiled.

The aforementioned sections and statutes are contained in the appendix hereto.

STATEMENT OF THE CASE.

This case is an action for declaratory judgment in which the jurisdiction of the District Court was invoked on the basis of the amount in controversy being in excess of $10,000 and diversity of citizenship, plaintiff being a corporation organized and existing under the laws of the State of Kentucky, with its principal place of business in said State, and the defendant a corporation organized and existing under the laws of the State of Alabama, in which State it has its principal place of business.

The purpose of the declaratory judgment proceeding was to construe the indemnity provisions of a spur track agreement between the parties herein. An employee of the petitioner (lumber company) filed suit against the respondent (railroad) charging that it negligently operated railroad cars at the premises of the petitioner so as to cause them to collide with a lumber rack and force it into a wooden shed which collapsed and injured the employee.

The respondent (railroad), upon being sued, made demand upon the petitioner to defend the action and pay any loss sustained by the railroad on the basis of the indemnity agreement.

The case was submitted upon an agreed stipulation of facts, following which the District Court, and subsequently the Court of Appeals, concluded that wording of the indemnity agreement reflected a purpose to indemnify the railroad against the consequences of its own negligence. The petitioner's assertion that the public policy of the State of Alabama does not permit such construction was rejected by the Court of Appeals on the theory that "**the stipulated facts do not connect the railroad's negligence with its duties as a common carrier**". The Court of Appeals refused to respect the provisions of Title 48, Code

of Alabama, Sec. 205 as recompiled, requiring railroads to construct spur tracks on the basis that the Alabama Public Service Commission had adopted no general rules to implement the Statute. It ignores the fact that under the Alabama Constitution a railroad company is a common carrier.

REASON FOR GRANTING THE WRIT.

The decision of the Court of Appeals involves a substantial and vital question of public policy frequently presented to the Federal and State Courts of this Nation and the holding therein is in conflict not only with the statutes and settled law of the State of the Forum, but also the prior decisions of the Supreme Court of the United States and the Fifth Circuit Court of Appeals, itself.

The increasing prosperity of our nation, tempered by the bitter lessons of the depression and subsequent regressions has given rise to a need for security, both in business and our personal affairs. The old "all or nothing" gambling approach seen so much in the past has been replaced by the sound business practice of obtaining a cushion against a loss that could mean financial ruin. Insurance Companies have capitalized on this need for security to the point that the insurance industry is growing by "leaps and bounds". However, many of our contemporaries are not content to pay the premium for their security and **"indemnity against one's own negligence contracts"** are becoming more and more prevalent.

Generally speaking, these contracts arise out of a situation where one of the parties is in a commanding bargaining position and, as such, is able to thrust its terms upon the party in the inferior position. The injustice perpetrated by these agreements is apparent; even when the contracting parties stand on equal footing under the

law, but where one of the parties derives its superior advantage from a monopoly granted by a public franchise, it becomes a serious and vital matter of public policy. This Court recognized the critical nature of these questions in **Bisso v. Inland Waterways Corp., 75 S. Ct. 629, 349 U. S. 85, 99 Law Ed. 991.** In the opinion written by Mr. J. Black, we find the Court tracing the judicial travels of "release-from-liability" clauses in towage contracts commencing in 1871 with **The Steamer Syracuse, 12 Wall. 167, 20 L. Ed. 382,** to intercircuit conflict terminating in **The Wash Gray, 277 U S. 66, 48 S. Ct. 459, 72 L. Ed. 787,** and observing:

"It is nevertheless argued that The Steamer Syracuse and The Wash Gray did not announce a rule of public policy against release-from-negligence contracts, but decided no more than what the towage contracts in those cases meant. Strong arguments can be made in support of this contention, but we think stronger argument can be made against it. * * * **The Steamer Syracuse, The Wash Gray and intervening lower court cases together strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing Towers from all liability for their negligence. Because of this judicial history and cogent reasons in support of a rule outlawing such contracts, we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule.**

This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships, such as bailors and bailees, employers and employees, public service companies and their customers. **The two main reasons for the creation and application of the**

rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. These two reasons are no less applicable today than when The Steamer Syracuse and The Wash Gray were decided, and both reasons apply with equal force whether the tugs operate as common carriers or contract carriers. The dangers of modern machines makes it all the more necessary that negligence be discouraged."

In a concurring opinion in **Bisso v. Inland Waterways Corporation,** Mr. J. Douglas pointed out:

> "Common carriers may not **'by any form of agreement secure exemption from liability for loss or damage caused by their own negligence.'** Sun Oil Company v. Dalzell Towing Co., supra, 287 U. S. 294, 53 S. Ct. 136. See New York Central Railroad Company v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Liverpool & Great Western Steam Company v. Phoenix Insurance Company, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788. The reasons are as germane to a tug boat that is a contract carrier as they are to a tug boat that is a common carrier. They are well stated by Judge Coxe, dissenting in The Oceanica, 2 Cir., 170 Fed. 893, 896:
>
> > **'It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect.** * * *'"

This Court has most recently reversed the Fifth Circuit Court of Appeals in the case of **Dixilyn Drilling Corp. v. The Crescent Towing & Salvage Company, 83 S. Ct. 967,** holding that the rule of Bisso prevails to prohibit a barge-

owner from assuming liability for all losses arising out of towage, including those caused by the towers' negligence. This case not only establishes the rule for the Fifth Circuit in cases of this nature, but the decision also points out another consideration which would demand that the decision of the Court of Appeals be reviewed. This is found in the concurring opinion of Mr. J. Harlan in which he states:

> "While I would prefer to see Bisso reconsidered, believing, with deference, that it was wrongly decided, I nevertheless join the opinion of the Court. **Certainly in the law governing commercial transactions of this kind is an overriding consideration which would not be promoted by opening the Bisso rule to indeterminate exceptions** in instances where, unlike Southwestern Sugar, no functions of a regulatory agency are involved."

The need for "**certainty in the law governing commercial transactions of this kind**" is a compelling reason to merit review by this Court of the Court of Appeals' decision in which they have, as in the Dixilyn case, attempted to water down the rule of the Bisso case by applying an untenable distinction as will hereinafter be demonstrated.

The rule established by this Court for the Fifth Circuit in the Dixilyn case does not deviate from previous decisions of that Court. In **Chicago & Northwestern RR Co. v. Davenport, 205 Fed. 2d 589,** the Fifth Circuit had occasion to review a case in which a railroad employee sustained injuries when an insecurely attached grab-iron, located on the roof of one of the cars, came loose, causing him to fall. At the time of the employee's injury the railroad was engaged in hauling a circus. The Court held that the railroad had acted as a common carrier in the transportation of circus train and it was, therefore, not entitled

to indemnity against damages paid for its negligence. In its opinion, the Court held:

> "Appellant railroad relies upon the principle that, when a railroad company is acting outside the performance of its duty as a common carrier, * * * it is dealing with matters involving ordinary consideration on contractual relation; those who choose to enter into agreement with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service."
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> * * * * * * * *
>
> The present case presents the situation envisioned by the Supreme Court of New Hampshire in Bernardi Greater Shows v. Boston & M. R. R. Co., 86 N. H. 146, 165 A. 124, 131, where it is said that: '* * * If a case were presented in which it appeared that a railroad had entered this field as a common carrier, the federal decisions above mentioned would no longer be in point, and the case would be governed by the rule, which is equally well settled in the Federal Courts, that a common carrier acting as such cannot, by contract, relieve itself from liability for the negligence of itself or its servants.'"

We advert now to the law of the State of the Forum which, under the doctrine of Erie v. Tompkins, is controlling in this case. The Supreme Court of Alabama, in **Gulf, M. & O. R. Co. v. Scott, 27 Sou. 2d 150**, had occasion to pass on an indemnity agreement described by the Court as follows:

> "It was further provided under said agreement that the railroad company would not be liable to Scott for any damages on account of the killing or injuring of live stock straying through or escaping from the enclosure made by said fence for the life thereof, which

was agreed to be 15 years from the date of its execution, **whether caused by the negligence of the railroad company, or otherwise.**"

The plaintiff who had brought action against the railroad to recover damages for killing his bull, demurred to pleas setting up the Indemnity Agreement on the ground that it was void and against public policy. The Appellate Court affirmed the trial court in sustaining the demurrers on that basis.

In **Alabama Great Southern Railroad Company v. Thomas & Sons**, supra, the claim was also by a person who had contracted directly with the railroad, with our Supreme Court taking this view of the same:

> "The attempt of the defendant railroad company, as shown in the contract of affreightment, to relieve itself or liability, 'except for gross or wanton negligence', and also its attempt to reduce its responsibility in the manner of delivering to the connecting road to that of a mere agent of the consignor, are opposed to public policy and cannot be allowed. Steele v. Townsend, 37 Sls. 247, etc."

See also **Hissong v. Richmond & D. R. Co., 91 Ala. 517, 8 So. 776.**

The above cited Alabama cases have never been overruled and, therefore, state the applicable Alabama law which is in substantial conformity with the decisions of the Supreme Court of the United States heretofore cited.

The gravamen of the complaint against the respondent (railroad) for which it seeks indemnity against the petitioner (lumber company) is that it breached a statutory duty to the plaintiff in failing to stop the movement of the railroad cars which it was controlling in time to avoid

the same striking the lumber rack in the immediate vicinity of the track and pushing it into the wooden shed located in close proximity, by which acts plaintiff avers the same was caused to collapse upon him, resulting in his injuries. Title 48, Sec. 170, of the Code of Alabama, 1940, as recompiled, provides in part:

> "The engineer, or other person having control of the running of a locomotive on any railroad, must * * * on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train."

Sec. 173, Title 48, Code of Alabama, 1940, as recompiled, provides in substance that a railroad is prima facie liable for all damage to persons or property resulting from a failure to comply with the requirements of certain statutes, including the provision hereinbefore set out, and the burden of proof in any suit brought therefor is on the railroad company to show a compliance with the same and that there was no negligence on its part or its agents. These sections evidence the intention of the Legislature of Alabama to regulate and control the operation of railroads in this State and the plaintiff, Will Jackson, in his action against the respondent (railroad) is entitled to the benefits of these statutes.

It is small wonder that Alabama holds that it is in contravention of public policy for a common carrier to escape the obligations of its common law and statutory duty by contracting against its own negligence. Indeed, under the law of Alabama, if the decision of Fifth Circuit should prevail, it would require that the party contracting with the railroad would assume the burden of the high degree of care required of railroads. They would be required to indemnify the railroad for acts not amounting to negligence under the common law.

The end result here is that the petitioner is called upon to indemnify the railroad for a liability it assumes as a common carrier under our statutes. Petitioner submits that the indemnity agreement herein has been construed by the Court of Appeals to be valid if the contract of indemnity was entered into only in its private capacity. **However, the case in which indemnity is sought involved the railroad's duties as a common carrier.** Whatever its capacity at the time of the contractual undertaking herein, the respondent is seeking indemnity for its own negligence as a common carrier.

The Court of Appeals, showing the same reluctance to recognize the rule that a common carrier may not contract against its own negligence, as it did in the Dixilyn case, has held the doctrine inapplicable on the basis that the (railroad) was not acting in its capacity as a common carrier. **The Court, however, citing Article 242 of the Alabama Constitution of 1901, took judicial knowledge of the fact that the respondent was a common carrier.** This section of our Constitution provides, in part: "All railroads and canals not constructed or used exclusively for private purposes, shall be public highways, and **all railroad and canal companies shall be common carriers.**" By virtue of the fact that the respondent is a railroad, it is a common carrier, as a matter of law. **There is no provision or distinction in Alabama law allowing a railroad company to operate in any other capacity.**

The Fifth Circuit has held here that the respondent was not acting in its capacity as a common carrier in contracting to construct the spur track forming the basis for the indemnity agreement herein. In doing this, the Court not only has overlooked the clear and unequivocal language of the above quoted constitutional provision, but also has completely denied the validity of Title 48, Code of Alabama, 1940, Sec. 205, as recompiled, which provides:

"Spur and side tracks provided for.—**Every railroad is required to construct and maintain spur tracks and side tracks to industries already established under such reasonable rules and orders as may be made by the Commission.**"

Disdaining the aforementioned Statute, the Court of Appeals chooses to rely instead upon a statement of dubious universality from 175 A. L. R. at page 102 to the effect that "the service afforded the shipper by additional facilities (such as spur tracks to his plant) for the special handling of his freight is not required of the railroad under its duties to the public as a carrier, so that it may attach such conditions as it sees fit in giving its consent to furnish the particular service, including a provision for exemption from liability for loss through its own negligence." Since it cannot be disputed that the Petitioner is a member of the public, the foregoing assertion by the annotater in 175 A. L. R. is far from true in Alabama where, by Statute, common carriers are compelled to construct side tracks to service existing industries along the railroads right of way, subject only to reasonable rules made by the Public Service Commission and **not** the dictates of their own choosing.

The Court of Appeals reasons that "it makes no difference that an Alabama Statute may impose a duty on the railroad to construct and maintain spur tracks to existing industries. The Alabama Public Service Commission has adopted no general rules to implement that Statute, nor has it prohibited the kind of indemnity contract here agreed on." This distinction is untenable and violative of the public policy of the State of the Forum. It has wrongfully misplaced the burden of proof on the petitioner to negative the existence of any rules promulgated by the Public Service Commission which could not alter the mandate of the Statute but only its administration. It is certainly not within the power of the Public Service Com-

mission to pass on the public policy of the State of Alabama and prohibit indemnity contracts of this nature, especially in view of the many decisions of the Supreme Court of Alabama on this point. We furthermore submit that the Statute does not require the implementation of rules by the Public Service Commission as a condition of its validity. By its decision, the Court of Appeals has emasculated Sec. 205, supra, due to the failure of the Public Service Commission to exercise a doubtful authority by adopting general rules to implement the Statute.

In addition to the fallacious position of the Court of Appeals with regard to its construction of the Alabama Statute, that court has completely overlooked the basic principles giving rise to the doctrine that a common carrier may not contract against its own negligence. The rule has been applied (1) to prohibit a contract that would beget recklessness and negligence, and (2) to protect the members of the public in need of goods or services from being exploited by those who derive their power from a public monopoly. It is this latter consideration that is of concern in this case.

The respondent operates in juxta-position to the plant of the petitioner under Certificate of Public Convenience and Necessity, and in the enjoyment of its franchise, it has a monopoly insofar as supplying transportation services to industries located on its line. Whatever agreements or contracts shippers along the line must make, they are compelled to deal with the respondent by virtue of the fact that it operates its line under its franchise to the exclusion of all others. The Legislature of the State of Alabama has sought to protect the petitioner and those in similar positions by requiring railroads to construct and maintain spur tracks to industries already established. To allow a construction that the railroad can reap the benefits of its public franchise by extorting one

sided contracts of indemnity against its own negligence as a condition to constructing the spur tracks would be violative of the very basic tenets of the doctrine of the Bisso case would hold for naught decisions of the Law of the Forum. We submit that such a decision as sanctioned by the Court of Appeals should not survive as a precedent on this very serious and vital question.

CONCLUSION.

We submit that the decision of the Court of Appeals is in direct conflict with the settled law of the State of the Forum and of the Supreme Court of the United States, is contrary to Alabama public policy and therefore should not be allowed to stand in view of the vital nature of the question presented and the over-riding importance of obtaining certainty in commercial transactions. For these reasons the writ is due to be issued.

Respectfully submitted,

James E. Clark

JAMES E. CLARK,
Counsel for Petitioner.

I hereby certify that a true copy of the foregoing petition for writ of certiorari has been served upon Messrs. Lange, Simpson, Robinson and Somerville, attention Mr. Henry Simpson, Exchange Security Bank Building, Birmingham 3, Alabama, attorneys of record for Louisville and Nashville Railroad Company.

This 24 day of April, 1964.

James E. Clark

Counsel for Petitioner.

APPENDIX "A".

Opinion of the Court Below, 328 Fed. 2d 73.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20,355.

Miller and Company of Birmingham, Inc.,
Appellant,

versus

Louisville and Nashville Railroad Company,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(January 31, 1964)

Before Rives and Wisdom,* Circuit Judges.

Rives, Circuit Judge: In a declaratory judgment action, the district court construed the indemnity provisions of a spur-track agreement between the railroad and the industry[1] in favor of the railroad. The case was tried on stipulated facts. Paragraphs (12) and (14) of the con-

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* The third Judge constituting the Court became ill before argument was heard, and the case is decided by a quorum. 28 U. S. C. A. § 46 (c).

[1] The parties will be so called.

tract between the railroad (first party) and the industry (second party) read as follows:

"(12) Second party agrees that it will not construct any overhead structure lower than 22 feet above the top of the rail of said track, or any structure within eight feet from center line of said track, and that it will not place or permit any structures or obstructions, of either a permanent or temporary nature, on said track, or within the limits of the horizontal and vertical clearances above provided; and further agrees that it will indemnify and save harmless the first party against and from any and all claims for loss of or damage to property or injury to person caused directly or indirectly by the existence, location or condition of any structures or obstructions of any kind on the premises of second party, or by any structures or obstructions, of either a permanent or temporary nature, on said track, or within the limits of the clearances above provided. Knowledge of or notice to the first party of the existence, location or condition of any structures or obstructions of any kind on the premises of the second party, and its continued operation of the track thereafter, shall not be a waiver of this covenant.

"(14) The second party also agrees to indemnify and hold harmless first party against loss, damage, or injury from any act or omission of second party, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said track; and if any claim or liability shall arise from the joint or concurring act or omission of both parties hereto, their employees or agents, each party shall assume all liability for and indemnify the other party against loss, damage or injury to its

own employees and to its own property and the property of others in its care or custody, and liability for loss, damage or injury not herein provided for shall be borne by the parties equally. Provided, that nothing in this section contained is intended to or shall relieve second party of the obligations of release and indemnity contained in Sections 11 and 12."

The contract was drawn by the railroad, and executed by both the railroad and the industry. The railroad built the spur track in consideration, among other things, of the industry executing the contract.

An employee of the industry filed suit against the railroad charging that it negligently operated railroad cars at the premises of the industry so as to cause them to collide with a lumber rack and force it into a wooden shed which collapsed on and injured the employee. The wooden shed was six feet, at its closest point, from the center line of the spur track. The shed was constructed by the industry more than two years prior to the accident, and the railroad had knowledge of its location and of its proximity to the spur track. The lumber rack was on the premises of the industry, and had been placed in the immediate vicinity of the spur track by employees of the industry other than the injured employee. The outermost portion of the railroad car alleged in the employee's complaint to have come into contact with the lumber rack was four feet and eight inches from the center of the spur track.

The railroad, upon being sued, made demand upon the industry to defend the action and to pay any loss which might be sustained by the railroad. The industry declined and the railroad then filed this declaratory judgment action praying that the court declare whether, under the provisions of the contract, the industry is obligated to defend the action and to hold the railroad harmless. By its an-

swer the industry joined with the railroad in seeking an adjudication of the controversy. The district court said in its conclusions of law:

". . . . Absent conduct on its part as, for example, its sole negligence producing the injury to Jackson, Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir., 257 F. 2d 410, which is not the case here presented, plaintiff is entitled to indemnity under paragraph 12 of the contract, Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U. S. 563, limited only by the modifying provisions of paragraph 14 respecting employees of the parties.

"Under the first clause of paragraph 14, the defendant has agreed to indemnify the plaintiff from the former's act or omission resulting in injury to the employees of either; and in view of the clause immediately following, defendant would not be bound to indemnify plaintiff under the first clause for an act or omission of the plaintiff not joint or concurring with its own act or omission. A consistent reading requires that indemnity under the first clause be predicated upon a sole act or omission of the defendant producing injury, as distinguished from a sole act or omission of the plaintiff, or a joint or concurring act or omission of both. The facts stipulated establish the joint and concurring act or omission of both plaintiff and defendant. Dery v. Wyer, 2 Cir., 265 F. 2d 804, 810, the parties having expressly agreed that in such case each party will assume liability for injury to its own employees and indemnify the other party against such injury. The defendant is bound by its contract to assume liability for the injury to its employee, Will Jackson, and to indemnify plaintiff against such injury. There is no room for the application of any theory of primary and secondary or active and pas-

sive negligence, where, as here, the indemnity is contractual. Weyerhaeuser, supra; Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corp., 350 U. S. 124."

The district court adjudged that the industry is bound to defend the suit of its employee against the railroad and to hold the railroad harmless.

The industry's principal reliance is upon this Court's decision in **Batson-Cook Co. v. Industrial Steel Erectors**, 5 Cir. 1958, 257 F. 2d 410. In that case we stated the rule in Alabama to be that, "while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence." 257 F. 2d at 412. No such clear intent was found in **Batson-Cook** because the contract did not contain "the talismanic words 'even though caused, occasioned or contributed to by the negligence, sole or concurrent' of the indemnitee, or like expressions . . . [or] the equivalent clear intent in other language of the agreement." 257 F. 2d at 412. The opinion continued that, "The purpose to impose this extraordinary liability on the indemnitor must be spelled out in unmistakable terms." 257 F. 2d at 413.

The industry devotes the major part of its lengthy brief to a vigorous defense of **Batson-Cook** against criticisms contained in **Jacksonville Terminal Co. v. Railway Express Agency, Inc.**, 5 Cir. 1962, 296 F. 2d 256; **Crescent Towing & Salvage Co. v. Dixilyn Drilling Co.**, 5 Cir. 1962, 303 F. 2d 237, reversed in **Dixilyn Drilling Co. v. Crescent Towing & Salvage Co.**, 1963, 372 U. S. 697; **Southern Natural Gas Co. v. Wilson**, 5 Cir. 1962, 304 F. 2d 253; and perhaps also in **Republic Steel Corporation v. Payne**, Ala. 1961, 132 So. 2d 581, 585; **U. S. F. & G. Co. v. Mason &**

Dulion, Ala. 1962, 145 So. 2d 711; 713; and **Deen v. Holderfield**, Ala. 1963, 155 So. 2d 314. We do not find it necessary to decide whether **Batson-Cook** is presently a sound holding under the law in Alabama, because we think that, even under the strict test announced in that case, this contract clearly reflects a purpose to indemnify the railroad against consequences contributed to by its own negligence.

The industry admits that it constructed the wooden shed six feet at its closest point from the center line of the spur track and the lumber rack in the immediate vicinity of the track, whereas it had agreed not to put any structure or obstruction, temporary or permanent, within eight feet from the center line of the track. The industry agreed to "indemnify and save harmless the first party (railroad) against and from any and all claims for loss of or damage to property or injury to person caused directly or indirectly by the existence, location or condition of any structures or obstructions of any kind on the premises of second party, or by any structures or obstructions, of either a permanent or temporary nature, on said track, or within the limits of the clearances above provided."

If there were any doubt that "any and all claims" as used in the 12th paragraph include claims contributed to by the negligence of the railroad, that doubt would be removed by the 14th paragraph, certainly insofar as injuries to employees are concerned. To repeat, the 14th paragraph provides, in part, that: ". . . if any claim or liability shall arise from the joint or concurring act or omission of both parties hereto, their employees or agents, each party shall assume all liability for and indemnify the other party against loss, damage or injury to its own employees and to its own property and the property of others in its care or custody, and liability

for loss, damage or injury not herein provided for shall be borne by the parties equally. Provided, that nothing in this section contained is intended to or shall relieve second party of the obligations of release and indemnity contained in Sections 11 and 12."

The contention that the phrase "any claim or liability (arising) from the joint or concurring act or omission of both parties" does not unequivocally include negligent acts or omissions is unfounded. Admittedly, the phrase is broader, for it would include also intentional torts and breaches of contractual duties, such as the industry's breach of its promises in Paragraph 12. But to say that it does not include negligent acts would be to say that use of the word "negligence" is essential. **Batson-Cook** made no such holding, but expressly indicated otherwise—". . . while it need not be done in any particular language . . ." 257 F. 2d at 412. The Supreme Court of Alabama speaking on the related subject of release of a grantor from liability caused by mining operations, was even more explicit:

> "Apparently, the trial court took the position, as do appellees, that since the exculpatory provisions of the deed make no mention of 'negligence,' it was not intended to exonerate Republic from liability for its negligence, particularly in view of the rule that such provisions should be strictly construed against exoneration. Although the word 'negligence' is not used, it seems to us it was clearly intended to release Republic from liability for its negligence. Otherwise, most of the exculpatory provisions, including the covenant not to sue, would be without meaning. It is difficult to see how such provisions could have been more comprehensively drafted to relieve Republic from liability for damages, whatever might be the basis therefor, except, perhaps, by specifically

using the word 'negligence.' But failure to use such word is not alone determinative of the intention of the parties. To say it was intended to relieve Republic only from liability for damages based on a nuisance (cf. Terrell v. Alabama Water Service Co., 245 Ala. 68, 70-71, 15 So. 2d 727), would be to disregard the plain and unambiguous wording of those provisions exonerating Republic 'from **any** and **all** claims for damages and **all** liability by reason of damages either to persons or property which may **in any way** be caused or occasioned at any time,' and the covenant not to sue."

Republic Steel Corporation v. Payne, Ala. 1961, 132 So. 2d 581, 585, 586.

Moreover, the final proviso in Paragraph 14 is a clear recognition by the parties that the industry's obligation of indemnity contained in Paragraph 12 is broader than its promises in Paragraph 14, and covers other claims or liabilities as well. We conclude that the industry's indemnity embraced claims based on the railroad's negligence.[2]

It had seemed to us that if the contract to indemnify the railroad does not embrace claims based on the railroad's negligence it had no meaning. In a supplemental brief, appellant's able counsel sought to refute that view.[3]

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[2] Accord: Eureka Coal Co. v. Louisville & Nashville R. Co., Ala., 1929, 122 So. 169; Booher-Kelly Lumber Co. v. Southern Pacific Co., 9 Cir. 1950, 183 F. 2d 902; Seaboldt v. Pennsylvania R. Co., 3 Cir., 1961, 290 F. 2d 296, on second appeal, 1963, 317 F. 2d 363, cert. denied under name Thompson Mahogany Co. v. Pennsylvania R. Co., 1963, 375 U. S. 907.

[3] In substance as follows:

"At the argument of this appeal, counsel for the appellant was requested to suggest to the Court a field of operation for the hold harmless agreement relied upon by the Railroad if the appellee is not to be indemnified thereunder for loss or liability arising out of its own negligent conduct. In this connection, we submit that in

While the resourcefulness of counsel is admirable, their refutation appears to us strained and our view remains unchanged insofar as concerns any field of operation of the contract which would ordinarily be in the minds of the parties.

The industry did not plead as an affirmative defense that the indemnity agreement is an illegal contract, but it does urge that the public policy of the State does not permit a construction which would indemnify a common carrier for its own negligent conduct. As noted, however, in a valuable annotation in 175 A. L. R., at p. 102, ". . . the service afforded the shipper by such additional facilities for the special handling of his freight is not required of the railroad under its duties to the public as a carrier, so that it may attach such conditions as it sees fit in giving its consent to furnish the particular service, including a provision for exemption from liability for loss through its own negligence." Accord as to contract indemnifying

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Alabama under the authority of *Mallory Steamship Company v. Druhan*, 17 Ala. App. 365, 84 So. 874 [877], 'where both parties are at fault, but the fault of the party from whom indemnity is claimed was the efficient cause of the injury,' indemnity is recoverable. See also *City of Mobile v. George*, 253 Ala. 591, 45 So. 2d 778, to the effect that one held liable to an injured person because of his passive negligence has rights of indemnity over against another who was not sued by the injured party, but who was guilty of active negligence. . . .

"We further suggest that the sidetrack agreement could effectively provide indemnity to the Railroad for loss and expense incurred by it in the investigation and defense of an action arising out of some alleged wrong claimed to have been committed by it involving the tracks on the premises of the appellant industry, but where it is adjudicated that the Railroad is free of fault on account of its lack of negligence. . . .

". . . We submit that the Louisville & Nashville Railroad Company in its use of the sidetrack on the premises of Miller & Company of Birmingham, Inc., could incur a liability under the F. E. L. A. to one of its own employees thereupon injured by reason of its unsafe condition, and despite the absence of active negligence on the part of the railroad in creating the danger. The appellee could look to the industry, however, for indemnity on account of its breach of this non-delegable duty. . . ."

railroad against injuries by operation of light and power line. **Eureka Coal Co. v. Louisville & Nashville R. Co.**, Ala. 1929, 122 So. 169; see also, 6A Corbin on Contracts, § 1471, p. 589.

The stipulated facts do not connect the railroad's negligence with its duties as a common carrier, or even show that the railroad is a common carrier, though we take judicial notice that it is.[4] Here, however, the railroad was contracting for a service not required of it as a common carrier. See **Chicago & N. W. Ry. Co. v. Davenport**, 5 Cir. 1953, 205 F. 2d 589, 594, 595.

It makes no difference that an Alabama Statute[5] may impose a duty on the railroad to construct and maintain spur tracks to existing industries. The Alabama Public Service Commission has adopted no general rules to implement that statute, nor has it prohibited the kind of indemnity contract here agreed on. In **Sunlight Carbon Co. v. St. Louis & S. F. R. Co.**, 8 Cir. 1926, 15 F. 2d 802; 805, it was said: ". . . on principle we perceive no reason why a railroad company may not, when acting in its private capacity, relieve itself from an absolute liability imposed by statute as well as from liability resulting from negligence." The spur track in this case was constructed and maintained not under the mandate of this statute but pursuant to the agreement between the industry and the railroad.

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[4] Section 242 of the Alabama Constitution of 1901 provides in part:

"All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers."

[5] "§ 205. *Spur and sidetracks provided for.*—Every railroad is required to construct and maintain spur tracks and side tracks to industries already established under such reasonable rules and orders as may be made by the commission." Title 48, §205 of the 1940 Code of Alabama.

In the main, we agree with the district court's construction of the indemnity agreement. We disagree, however, with its judgment that the industry is bound and obligated to defend the suit of its employee against the railroad. The industry has the option to take its chances and await the possible event of the liability of the railroad becoming fixed and ascertained. **King v. Capitol Amusement Co.**, Ala. 1930, 130 So. 799. However, after notice and an opportunity to defend, any judgment against the railroad will be conclusive against the indemnitor industry, unless obtained by fraud or collusion.[6] Further, in the event of judgment against the railroad, the agreement to "hold harmless" includes the costs of defending the claim. See 19 Words and Phrases, Perm. ed., p. 570 and pocket supplement.

The judgment is therefore modified so as to eliminate the provision that the industry is bound and obligated to defend the suit of its employee against the railroad. As so modified, the judgment is affirmed. Costs of appeal are taxed against the appellant.

Modified and Affirmed.

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[6] King v. Capitol Amusement Co., supra; 27 Am. Jur. Indemnity, §§ 34 and 35; p. 478; 42 C. J. S., Indemnity, § 32a, pp. 613-615

APPENDIX "B."

Applicable Section From Constitution and Statutes.

Article 12, Section 242, Alabama Constitution of 1901:

"Sec. **242.** All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this state, and connect at the state line, with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers, and cars, loaded or empty, of the others, without delay or discrimination."

Title 48, Section 170, Alabama Code, 1940, as Recompiled:

"§ **170.** (9952) (5473) (3440) (1144) (1699) (1399) **Duty of engineer as to ringing bell and blowing whistle.**—The engineer or other person having control of the running of a locomotive on any railroad, must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular station or stopping place on such railroad, and continue to blow the whistle or ring the bell at short intervals, until it has passed such crossing, or reached such station or stopping place. He must also blow the whistle or ring the bell immediately before and at the time of leaving such station or stopping place; and also immediately before entering any curve crossed by a public road, where he cannot see at least one-fourth of a mile ahead, and must approach and pass such crossing at such speed as to prevent accident in the event of an obstruction at the crossing. He must

also blow the whistle or ring the bell at short intervals, on entering into, or while moving within or passing through any village, town, or city. He must also, on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train."

Title 48, Section 173, Alabama Code, 1940, as Recompiled:

"§ **173.** (9955) (5476) (3443) (1147) (1722) (1401) **Railroad liable for injuries; burden of proof.**—A railroad company is liable for all damages done to persons, or to stock or other property, resulting from a failure to comply with the requirements of the three preceding sections, or any negligence on the part of such company or its agents, and when any person or stock is killed or injured, or other property destroyed or damaged by the locomotive or cars of any railroad, the burden of proof, in any suit brought therefor, is on the railroad company to show a compliance with the requirements of such sections, and that there was no negligence on the part of the company or its agents."

Title 48, Section 205, Alabama Code, 1940, as Recompiled:

"§ **205.** (10041) (5544) **Spur and sidetracks provided for.**—Every railroad is required to construct and maintain spur tracks and sidetracks to industries already established under such reasonable rules and orders as may be made by the commission."